THEN KIM FAR

v.

MERCANTILE INSURANCE SDN. BHD.

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO. KG. 116 OF 1991]
11 FEBRUARY 1993

ARBITRATION: Delay in making reference to arbitration - Application for extension of time to refer matter to arbitration - Applicant not aware of arbitration clause - Whether delay inordinate and inexcusable - Whether respondent would incur undue hardship - Whether application for extension should be entertained.

INSURANCE LAW: Motor insurance policy - Claim made under policy - Dispute on quantum - Policy providing for settlement of dispute by reference to arbitration - Applicant filing civil claim - Respondent disclaiming liability - Whether disclaimer valid - Date of disclaimer - Whether upon breakdown of negotiations or upon stay of the civil suit.

The applicant took a motor insurance policy with the respondent. During the currency of the policy the applicant was involved in an accident which caused damage to the insured vehicle. The applicant made a claim and the respondent made an offer which was rejected. The applicant filed a civil claim and obtained judgment in default. The respondent successfully applied to set aside the judgment and to stay the proceedings on the grounds that the matter should be referred to arbitration pursuant to the terms of the policy.

On the applicant's application for extension of time to refer the matter to arbitration the questions for the determination of the Court were:

(1) Whether there was in fact a disclaimer by the respondent and if so, what was the date of the disclaimer to bring the relevant condition of the policy into operation.
(2) Whether the delay in bringing the application for extension was inordinate and inexcusable.

Held:

[1] It was reasonable to infer that the respondent had disclaimed liability to the applicant in respect of his claim and the disclaimer was effective from the date of receipt of the applicant's solicitors' letter rejecting the respondents settlement offer.

[2] There was inordinate and inexusable delay on the part of the applicant in making the application for extension of time. Due to the delay the respondent is put to much disadvantage and if the application was granted undue hardship would be caused to the respondent through no fault of theirs.

[Application for extension of time to commence arbitration proceedings dismissed with costs].

Legislation referred to:
Arbitration Act 1952, s. 28
Rules of the High Court 1980, O. 32 r. 13(b)

For the applicant - John Shek, M/s. John Shek & Co.
For the respondent - Stanley Eddy; M/s. Battenberg & Talma

JUDGMENT

Hj. Abdul Kadir Bin Sulaiman J:

This is an application by the applicant for an extension of time for the appointment of an arbitrator pursuant to s. 28 of the Arbitration Act 1952.

The background leading to this application is as follows. The applicant took a Motor Insurance Policy with the respondent company for period from 22 September 1986 to 21 September 1987 to cover against loss and damage to the applicant's motor vehicle bearing registration No. KJ 86 and to accessories and spare parts whilst thereon by accidental collision. On 19 January 1987 during the currency of the policy the applicant's vehicle was involved in a road accident and damage was caused to the vehicle. The applicant made a claim and by a letter dated 16 September 1987, the respondent offered to pay RM30,000 to settle the claim. It was rejected by the applicant.

On 27 October 1987 the applicant filed a suit in the Sessions Court Kuching in Summons No. SC/KG. 395/87/I against the respondent. The claim is for:

(a) The insured sum RM60,000 or alternatively,
(b) The repair and reinstatement of the said vehicle in roadworthy condition.
(c) Loss of use of the said vehicle at RM50 per day from 18 January 1987 till date of full settlement or reinstatement.

(d) Interest at the rate of 12.75% per annum as from 18 January 1987 to the date of judgment and thereafter at the rate of 8% per annum till full settlement.
(e) Costs.

On 6 February 1988 judgment in default was entered against the respondent with assessment of damages put to 30 April 1988 and subsequently adjourned to 8 October 1988. In the meanwhile, on 19 August 1988, the respondent filed in an application before the Sessions Court to have the default judgment set aside and that the proceedings stayed to enable the matter to be referred to arbitration "pursuant to the conditions of the insurance policy". The application of the respondent was finally disposed off and on 8 April 1989 the Court ordered that the judgment in default be set aside and that the proceedings be stayed to enable the matter to be referred to arbitration.

Following the order of the Court, by a letter dated 11 August 1989 the Counsel for the applicant wrote to the Counsel for the respondent to find out whether the respondent had any arbitrator that it wished to appoint. By a letter dated 14 August 1989 the Counsel for the respondent replied drawing the attention of the applicant to condition 8 of the policy that the matter should be referred to arbitration within 12 months from the disclaimer. The policy issued to the applicant was a standard private car policy. Condition 8 of the policy states:

> All differences arising out of the this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the Parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrator one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the company. **If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.**
> [Emphasis supplied].

In his submission, Counsel for the applicant conceded to the existence of condition 8 in the said policy of insurance issued to the applicant but the delay to proceed with the arbitration proceeding was because the applicant was never in the picture of the arbitration clause. For that reason he chose to proceed by way of the suit in the Sessions Court referred to earlier. The respondent contends that the date of disclaimer was 16 September 1987 i.e. the date of the letter of offer of a sum of RM30,000 by the respondent which offer was rejected by the applicant. Thus by the time the applicant sought to find out the arbitrator to be appointed by the respondent as contained in his letter dated 11 August 1989 above-mentioned, the period of 12 months stipulated by Condition 8 of the policy had long passed. However, it is the contention of the applicant that the relevant date should be the date of the Court order i.e. 8 April 1989. Be that as it may, what is relevant for me to consider firstly, is whether or not there exists a disclaimer by the respondent and if so, what was the date of the disclaimer by the respondent to bring the relevant condition in the policy into operation. According to the relevant condition in the policy, any claim must be referred for arbitration within 12 months from the date of the disclaimer by the respondent. Any claim not referred to for arbitration after that period shall be deemed to have been abandoned and shall not be recoverable under the policy. If, on the other hand, I find that there is no disclaimer by the respondent, the arbitration condition has not been in operation as yet and therefore the application for extension of time would not arise in this case.

In this application by the applicant for the extension of time, the evidence of the applicant is contained in the affidavit affirmed by Jie Nyuk Choo, the advocate for the applicant, on 19 August 1991 and further affidavit affirmed by the applicant himself on 24 July 1992 in support of the first affidavit. The evidence of the respondent is contained in the affidavits of Clara Lian, the Claims Manager of the respondent company, affirmed respectively on 16 August 1988 and 6 April 1989 filed in the Sessions Court in the application of the respondent to set aside the default judgment above-mentioned, tendered pursuant to O. 32 r. 13(b) of the Rules of the High Court 1980 in this proceedings. What is relevant for the present purpose in regard to the evidence of the respondent is contained in paragraphs 4 and 5 of the affidavit of Clara Lian of 16 August 1988. What is stated in the two paragraphs is

that after the accident, the respondent entered into negotiations with the applicant and his solicitors and it reached a stalemate and the last correspondence was from the applicant's solicitors dated 24 September 1987 after which there was no correspondence from either side until the receipt of a registered letter dated 5 November 1987 containing the summons in the Sessions Court suit above-mentioned. However, the said letter dated 24 September 1987 is not in evidence before me either for the applicant or for the respondent.

As for the applicant, on 21 September 1987 his Counsel received a letter dated 16 September 1987 from the respondent as follows:

> 16 September 1987
>
> M/s. John Shek & Co.
> Advocates & Solicitors,
> No. 26, Lot 92 1st Floor,
> Green Hill Road,
> 93100 Kuching.
>
> Dear Sirs,
>
> Re: Accident involving vehicle KJ 86 on 18 January 1987
>
> Thank you for your letter of 9 September 1987 in connection with the above claim.
>
> We wish to advise that our offer of RM30,000 gross to settle your client's claim was on a "Cash-In-Lieu" of repairs basis and not as a total-loss settlement. Due to this mode of settlement your client has the liberty to take whatever course of action he deem fit with regards to the damaged vehicle. As such, we are of the opinion that the said offer is a very fair and reasonable figure.
>
> Kindly request your client to sign and return the set of Discharge Voucher which we have sent to him earlier to enable us to effect payment.
>
> Yours Faithfully,
>
> sgd: Simon Chan
> for General Manager
>
> c.c. Sadong Agency Sdn. Bhd.
> Public Finance Berhad,

The applicant did not accept the offer made as according to him the repair cost would be in excess of RM65,000. In the result he abandoned and kept the vehicle in the workshop. On 27 October 1987 he commenced an action in the Sessions Court in Summons No. SC/KG. 395/87/I above-mentioned.

Looking at the evidence of both the applicant and the respondent, it would appear that after the applicant's solicitors' letter dated 24 September 1987 there was no further offer made by the respondent to the applicant until the receipt of the summons, it would be reasonable to infer that the respondent had disclaimed liability to the applicant in respect of his claim, and the disclaimer, in my view was effective from the date of receipt of the applicant's solicitors' letter of 24 September 1987 and not on 16 September 1987 as claimed by the respondent or on 8 April 1989 as claimed by the applicant. Since the matter of dispute had not been referred to arbitration as required by Condition 8 of the policy within the 12 months period, it is therefore, necessary for the applicant to apply to the High Court for an extension of time to commence the arbitration proceedings.

Having so decided I will now turn to the application made by the applicant. It is clear from the submission of the Counsel for the applicant that he was unaware of the existence of the arbitration clause until the matter was brought out in the proceedings by the respondent to set aside the default judgment entered against it in the suit filed by the applicant. This is the sole reason for the delay on his part. Being unaware of the existence of the clause or the condition in the policy is of no excuse to the applicant as this forms part of the terms of his contract with the respondent. But this fault on the part of the applicant *per se* should not be the reason for disallowing his application for extension of time. There must be undue hardship caused upon him by the refusal which is out of proportion to his fault. In making its decision the Court has to consider the facts of each particular case in coming to its proper decision in the matter. A delay of a day or two may be reasonable to decide in favour of the applicant. However, in this case before me now, up to the date of the filing of this application by him some 4 years had gone by since the date of the disclaimer by the respondent. Given the 12 months period allowed by the condition of the policy, the applicant was late by some 3 years before he made this application for extension of time, on 19 August 1991.

The applicant was never at all aware of the provisions for arbitration in the policy of insurance had it not been for the application by the respondent to have the default judgment given against it in relation to the applicant's suit in the

Sessions Court set aside. The notice of application would have drawn the attention of the applicant on the matter of arbitration. This application by the respondent was filed on 19 August 1988, which was still within time for the applicant to proceed with the arbitration proceedings. But nothing was done towards this end. That application by the respondent was set down for hearing on 8 October 1988 and subsequently disposed of on 8 April 1989. By that time if at all there was a delay in taking arbitration proceedings, the delay was of not so great significance and the applicant could have made an application immediately to the Court for extension of time. But he chose not to do so, for according to his Counsel, he was under the impression that the arbitration date should commence from the date of the Court order which is 8 April 1989. This manner of argument the Court cannot accept.

Be that as it may, on 14 August 1989 the Counsel for the respondent drew the attention that the matter should be referred to arbitration within 12 months from the disclaimer. Then followed the correspondence in regard to the dispute in relation to the date of disclaimer. Finally, it would appear from paragraph 20 of the affidavit for the applicant that the arbitration proceedings commenced on 6 July 1990 and application for extension of time "was filed on 6 December 1990 but were withdrawn pending a fresh originating summons being taken out whereby both parties agreed that arguments be confined to matters, events and circumstances before 6 December 1990". Then comes this application now by the applicant which was filed only on 19 August 1991. Thus I would consider that unnecessary time has been wasted by the applicant before the matter finally came to Court for the exercise of its discretion under s. 28 of the Arbitration Act 1952, through no fault of the respondent as alleged.

So in the light of the circumstances that develop, I would consider that if this application by the applicant is granted, undue hardship would have been caused to the defendant instead. The accident happened in January 1987. On account of the dispute, the motor vehicle concerned was abandoned and kept in the local workshop since then. Six years had gone by. I therefore, hold that the long delay in filing the present application is inordinate and inexcusable. Allowing the matter now to go to arbitration would be an exercise in futility as far as the respondent is concerned. He is being put to much disadvantage due to the long delay caused by the applicant. In the circumstances the application by the applicant is dismissed with costs to the respondent.